

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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| In the Matters of |) | |
| |) | |
| Telecommunications Carriers Eligible for |) | WC Docket No. 09-197 |
| Universal Service Support |) | |
| |) | |
| Federal-State Board on Universal Service |) | |
| |) | |
| Worldcall Interconnect, Inc. Petition for |) | |
| Designation as an Eligible |) | |
| Telecommunications Carrier in the |) | CC Docket No. 96-45 |
| State of New York | | |

APPLICATION FOR REVIEW

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EXECUTIVE SUMMARY

Worldcall Interconnect, Inc. (WCX) respectfully requests Commission Review of the Wireline Competition Bureau's April 27, 2011 Order dismissing WCX's Petition for ETC status in New York State (DA 11-747).

The action taken by the Bureau on delegated authority must be reversed and the Bureau should be required to reinstitute and promptly complete review of the Petition. The Commission must order the Bureau to conduct a merits-based review of the specific service area that WCX proposed and the specific technology that WCX proposed. Any review on the merits will clearly demonstrate that, when compared to the way nearly nine billion dollars per year currently allocated with minimal oversight, WCX's application will be shown to be in the public's interest, and should be granted.

WCX's Petition presents unique opportunities that will provide the best possible solution for the service area in question because of WCX's 700 MHz LTE technology and its acquisition of the 700 B-Block license via FCC Auction 73. WCX will use its 700Mhz license to deliver state-of-the-art LTE technology to this area of New York, which is largely unserved and/or underserved from a broadband perspective. The Petition is clearly in the public interest, because it will result in advanced services and supported services to the citizens of this predominately rural service area, who presently do not have broadband, and therefore do not have the opportunities afforded to neighboring urban communities.

The Bureau's disposition is wrong from a legal perspective, but the policy result is egregious, particularly given the extreme delay between the Petition and the Order. The result reflects complete indifference to the current needs of the citizens in the service area. The

Bureau's Order is purely and simply an abject abandonment of the policies and purposes of the entire USF program. It perpetuates all the bad aspects of the "Identical Support Rule" identified by the Commission on multiple occasions, and prohibits recourse to the very "exception" mechanism the Commission put in place to address these problems pending ultimate reform of the universal service system.

The legal error is evident. The Bureau's Order construes Rule 54.307 to be mandatory: a CETC must always recover only Identical Support. The Order finds that the "own cost" "exemption" stated in the *CETC Interim Cap Order* allows a CETC to go through the arduous exercise of calculating "its own cost" but the result is not per-line support based on the CETC's own cost. Instead, the result merely restores full "Identical Support" without any cap. This reading simply cannot be squared with the actual words in the *CETC Interim Cap Order*, the Commission's defense of that Order before the D.C. Circuit or the prior "own cost" exemption decisions that explained how the exemption would work.

The Commission must reverse.

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| Worldcall Interconnect, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of New York |) | CC Docket No. 96-45 |

APPLICATION FOR REVIEW

NOW COMES WORLDCALL INTERCONNECT, INC. (“WCX”) and submits this Application for Review of the Wireline Competition Bureau’s April 27, 2011 Order Dismissing WCX’s Petition for Designation as an Eligible Telecommunications Carrier in the State of New York (DA 11-747). This Application for Review is timely submitted under Commission Rule 1.115.

A. Introduction.

The questions presented are (1) whether the Bureau has misinterpreted and misapplied the so-called “Identical Support Rule” in Rule 54.307; (2) whether the Bureau has misinterpreted and misapplied the “own cost” “exception” set out in the *CETC Interim Cap Order*¹; and, (3) whether the Bureau action is consistent with the fundamental universal service policies and principles established by Congress and the Commission. *See* Rule 1.115(b)(1). For purposes of

¹ Order, *in re High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Alltel Communications, Inc., et al. Petitions for Designation as Eligible Telecommunications Carriers, RCC Minnesota, Inc. and RCC Atlantic, Inc. Net Hampshire ETC Designation Amendment*, WC Docket No. 05-337 and CC Docket No. 96-45. FCC 08-122, ¶ 31, 23 FCC Rcd 8834 (rel. May 2008) (“*CETC Interim Cap Order*”).

Rule 1.115(b)(2), the following factors warrant Commission consideration of the questions presented:

The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, and established Commission policy (Rule 1.115(b)(2)(i)) and there is prejudicial procedural error (Rule 1.115(b)(2)(v)). The action taken by the Bureau on delegated authority should be reversed and the Bureau should be required to reinstitute and promptly complete review of the Petition. The Bureau must be ordered to conduct a merits-based review of the specific service area that WCX proposed and the specific technology that WCX proposed. *See* Rule 1.115(b)(3) and (4). Any review on the merits will clearly demonstrate that, when compared to the way nearly nine billion dollars per year currently allocated with minimal oversight, WCX's application will be shown to be in the public's interest, and should be granted.

B. Background on the Desired Service Area.

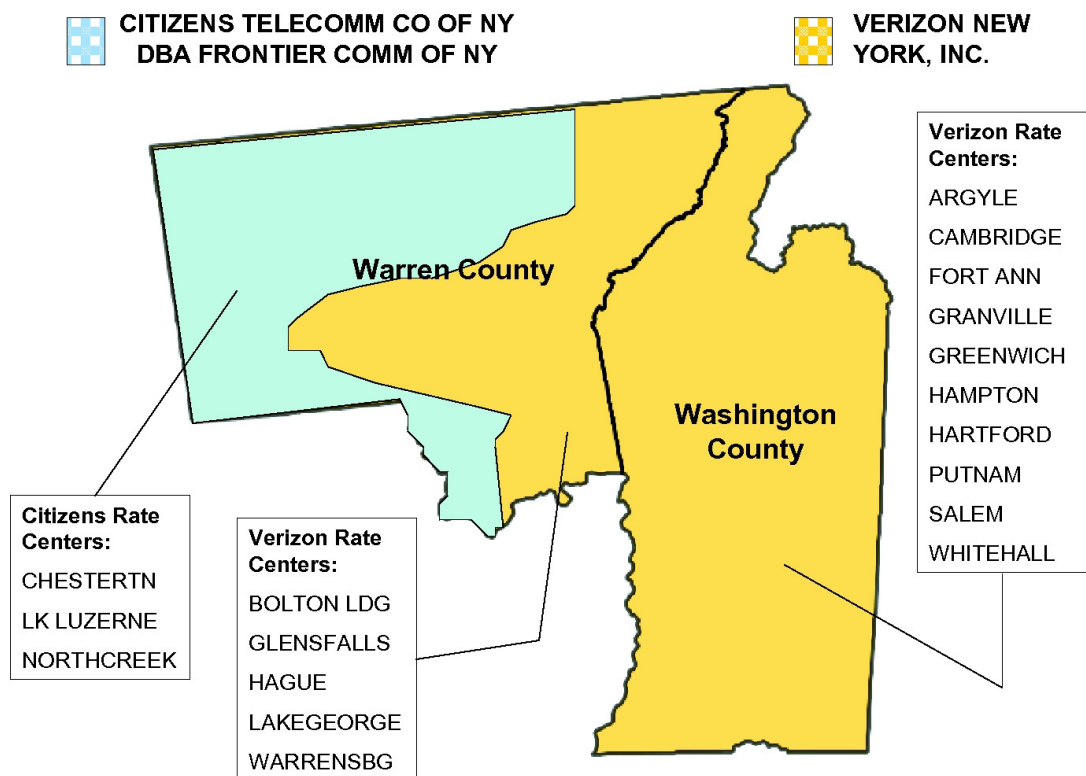
WCX is a Commercial Mobile Radio Service ("CMRS") provider of the kind that could not exist at the time "Identical Support" was instituted. While WCX has other spectrum available for use, WCX plans to use its LTE 700 MHz B-Block license (call sign WQJZ319) to serve the Glens Falls - Cellular Market Area 266 ("CMA 266") service area, which covers all of Warren and Washington counties in upstate New York, the subject of the Petition. WCX's proposed "service area" for the requested ETC designation is CMA 266 and presents unique opportunities that will provide the best possible solution for the area in question based on 700 MHz LTE technology. WCX plans to use its 700MHz license to deliver state-of-the-art LTE technology to this area of New York, which is largely unserved and/or underserved from a broadband perspective. The Petition is clearly in the public interest, because it will result in advanced

services and supported services to the citizens of this predominately rural service area, who presently do not have broadband, and therefore do not have the opportunities afforded to neighboring urban communities.

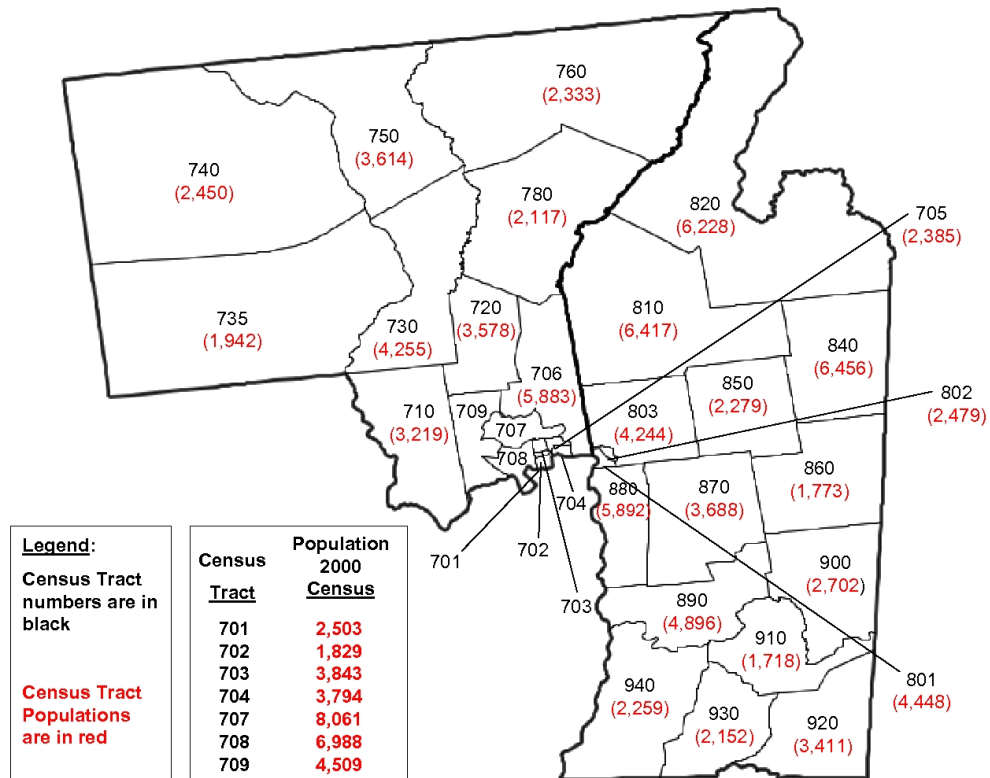
Exhibit B to the Petition contained three sets of maps containing the service area information on CMA 266. Those maps are reproduced on the following pages. These maps provide an overlay by existing ILEC coverage² and detailed census tract information showing that more than 95% of the proposed service area is “Rural” as defined by the OMB and Census Bureau definition. As noted, the “Service Area” is defined by WCX’s 700 MHz CMA 266 boundary. Thus, WCX is not picking and choosing among the affected LEC exchanges and as such “cream-skimming” is not remotely a concern in this case. To the contrary, WCX’s proposed ETC service area covers the less densely populated portions of the ILECs’ respective study areas and excludes more populous areas. The Citizens and Verizon wire centers within the service area have an average population density of 73 persons per square mile, while the ILEC study area wire centers outside of the proposed ETC service area are heavily populated. For example, WCX’s service area excludes Schenectady County which has a population density of 712 persons per square mile and Albany which has a population density of 562 persons per square mile. WCX’s proposed service area clearly passes any cream skimming analysis. *See* WCX Petition, pp. 3-4, 20-22, Exhibit B. More important, this is clearly a “high cost” *and* “rural” area because of the terrain and population density. Absent some form of support, it is highly unlikely that many residents of this area will ever have advanced services, including broadband.

² The incumbents serving the Service Area are Citizens Telecommunications of New York d/b/a Frontier Communications (“Citizens”) and Verizon.

Map 1 from Petition Exhibit B



Map 2 from Petition Exhibit B

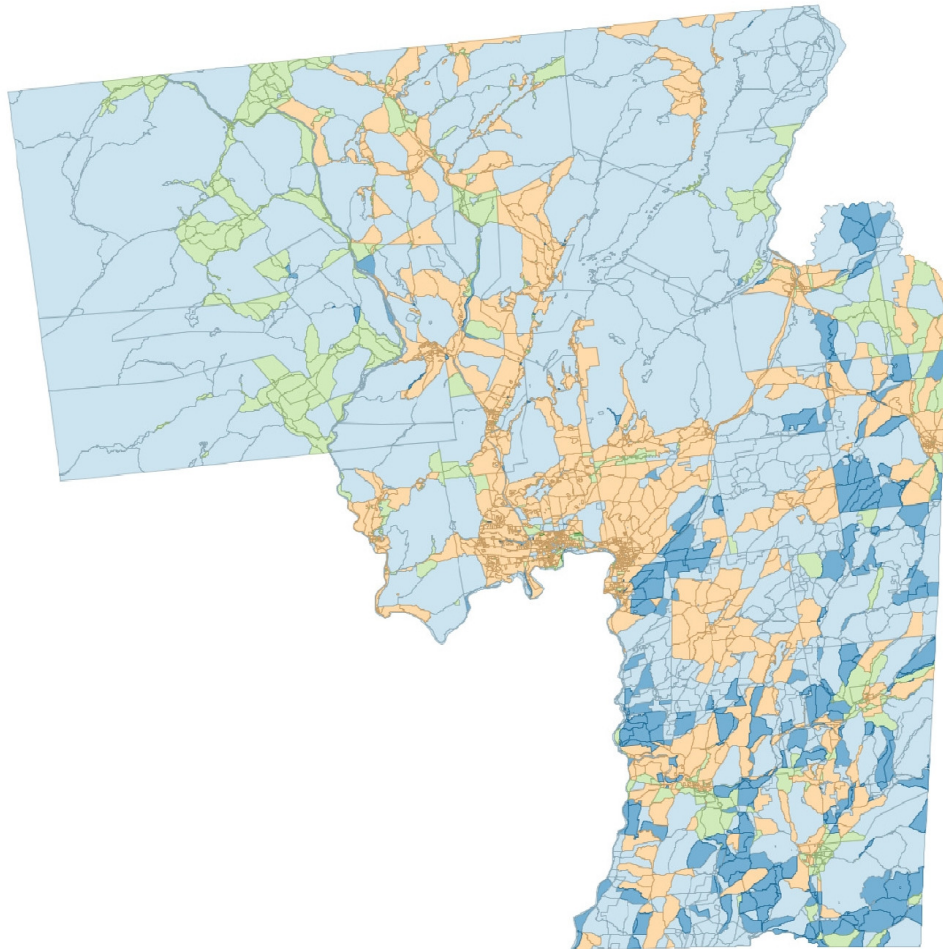


The map displays the geographical layout of Warren and Washington Counties, New York. Key features include:

- Counties:** Warren County (left) and Washington County (right).
- Towns:** North Creek, The Glen, Warrensburg, Lake George, West Glens Falls, Glens Falls, Fenwood, Ft. Edward, Argyle, Cambridge, Whitehall, Granville, and Salem.
- Roads:** State Routes S8, S22, S40, S149, S9N, U9, and U4; and Interstates I87 and I81.
- Water Bodies:** The Hudson River is shown flowing through the region.
- WCX Proposed Service Area:** Indicated by a checkered pattern in the legend, located in the western part of Warren County.

National Broadband Map

The most recent National Broadband Map dramatically demonstrates that this is so. The service area as depicted in the National Broadband Map is set out below. The “light blue” portions have *no* broadband Internet service (1.5 Mbps or above). The portions with other colors have advertised service but in actuality, with the exception of the suburbs of Glen Falls, inquiries have shown that the such advertised service is greatly overstated and the colorings other than light blue do not reflect actual availability or capability.



WCX's Service Area is undoubtedly "rural" and "high cost." For example, Adirondack Park, the largest park in the nation and largest state managed park in the contiguous United States, occupies 1,046 square miles and nearly 60% of WCX's combined Washington and Warren Counties service area. The park's 6.1 million acres encompasses an area large enough to hold Yellowstone, Yosemite, Grand Canyon, Glacier and the Great Smoky Mountains National Parks combined. The WCX service area includes Lake Luzerne, the Lake George Battlegrounds, Hearthstone Point, Lake George Islands and Rogers Rock campgrounds. The parks in Warren County have 2,402 seasonal residence parcels, with 5,789 seasonal residents, while Washington County has 628 seasonal residence parcels, with 1,601 seasonal residents. The Adirondack Park Agency, the New York State governmental agency charged with managing the park, has an ongoing project to improve cellular coverage within the park. While significant progress has been made in adding coverage to the I-87 region, relatively little coverage has been added to the areas along State Road 9N which traverses the western edge of Lake George.

Other considerations contribute to above-normal costs. For example, environmental and esthetic concerns sometimes require the construction of special towers that are taller than normal and the Park Service requires that they be designed to look like trees. In sum, providing broadband service in this area is simply not economic absent some form of support. This said, the best solution is still the LTE solution proposed by WCX. 700 MHz LTE will cover greater areas with fewer towers, allows the antennae to be placed at a lower height and the signals work extremely well through thick foliage. The WCX solution is clearly the best possible bang for the USF support buck.

The Bureau decision to dismiss WCX's Petition is flatly wrong from a policy perspective. WCX is trying to construct an advanced, IP-based network in a high-cost rural area that will provide not only "Supported Services" as currently defined, but also the very broadband the Commission is so focused on encouraging and supporting. There is **NO** broadband in much of the area, and unless some form of support is provided there never will be because the economics simply do not work in the absence of support. "Identical Support" means "no support" in the Verizon wire centers because Verizon's study area includes more densely populated areas as well and therefore its aggregated results are below the per-line threshold. The Citizens study areas are similarly aggregated, with the result that "Identical Support" will simply not be "sufficient."

Even more fundamentally, WCX has made extraordinary public interest commitments. Unlike many other wireless providers, WCX long ago committed to having an "open" network – far more than mere "net neutrality." WCX will allow users served by other providers to "roam" for both "voice" and "data" purposes. Petition ¶ 36, p. 16. WCX has offered to be rate of return regulated and undergo retroactive audits, which provides a mechanism to ensure support is used only in the service area, and only the amount of support that is actually required will be used. WCX November 13, 2009 *Ex Parte* Notice, pp. 2-4. The Network Improvement Plan is also designed to allow support amounts to be annually adjusted and decrease over time, ultimately perhaps reaching zero, since the preponderance of costs relates to initial construction rather than operations costs. In other words, the support will aid construction and once constructed the network and associated services might well be able to stand on their own without the need for further support.

Most importantly, the incumbents in the area have not made the investment needed to provide broadband services to the population. The reasons are surely many, but this means the area is in fact unserved and underserved by any measure and WCX has the optimal solution for the unique proposed service area. WCX deserves Commission review of its plan and service area on the merits, held to the same standard as incumbent providers who, frankly, are not prepared to provide any comparable solution. In essence, the Bureau's Order represents a "pick and choose" decision to favor the large incumbents, and arbitrarily discriminates among and between various geographic areas, all based on concepts related to bygone technology.

The Bureau chose to kick out the Petition based on an erroneous finding of defect, purely to avoid having to do the work necessary to implement policy which services the public interest. The result is that only large incumbents using wasteful antiquated technology are currently eligible for any support, and they are not providing service to the area.

The Bureau seems purely focused on a process for large providers and on applying 1997 thinking. They are apparently worried about the "least burdensome way to administer" a "transition" to new policy that seems to never come. We are now in 2011, and WCX submits that Bureau must do its job and review the Petition based on the merits and assessed in the same way as an ILEC with the same study area. This may not be the "least burdensome" but it is compelled by the Act and Commission precedent. This means if an ETC, especially one proposing to use the most efficient solution, wants support based on its own cost of providing service, the Bureau must do the necessary work to allow this solution and approve or reject based on the merits. WCX respectfully requests that the Commissioners require an actual public interest

review and assessment of the service plan and service area directly on the merits. In that light, the Petition must be approved.

As explained below, the Bureau's disposition is wrong from a legal perspective, but the policy result is egregious, particularly given the extreme delay between the Petition and the Order. The result reflects complete indifference to the current needs of the citizens in the service area. The Bureau's Order is purely and simply an abject abandonment of the policies and purposes of the entire USF program. It perpetuates all the bad aspects of the "Identical Support Rule" identified by the Commission on multiple occasions, and prohibits recourse to the very "exception" mechanism the Commission put in place to address these problems pending ultimate reform of the universal service system. The Commission must reverse.

C. WCX Petition: The Long Wait, Followed by an Order Dismissing Based on Spurious Finding of Defect.

WCX filed its Petition on October 20, 2008 – two years and seven months ago.³ The Wireline Competition Bureau issued a Notice of the Petition and established the comment cycle on December 4, 2008.⁴ Only one party, CCIA, submitted any comments in response to the Notice and they fully supported the application.⁵ WCX filed Reply Comments on January 21, 2009 noting that (i) no party opposed the Petition and (ii) CCIA supported the Petition and as such

³ WCX communicated with the Bureau and others at the Commission in advance of the Petition. Part of that communication previewed the Petition and the major issue: whether WCX could rely on the Commission's promise that competitive ETCs could submit their own costs and recover support based on their own costs rather than payments based on the so-called "Identical Support" rule and the "CETC Interim Cap." Docket 96-43, Worldcall Interconnect, Inc. *Ex Parte* Notice (October 6, 2008).

⁴ Comment Sought on the Petition of Worldcall Interconnect, Inc. for Designation as an Eligible Telecommunications Carrier in the State of New York, CC Docket No. 96-45, DA 08-2638 (rel. Dec. 4, 2008).

⁵ Comments of the Computer & Communications Industry Association ("CCIA") in Support Of Worldcall Interconnect, Inc. Petition For ETC Designation (Jan. 5, 2009).

requested that the unopposed Petition be granted.⁶ After the comment cycle closed, the Petition languished at the Bureau between February, 2009 and January 2011, despite WCX's communications from time to time with various Commission representatives attempting to determine whether there were questions or problems with the Petition, and further addressing the "own cost" issue on which it depended. *See e.g.*, WCX *Ex Parte* Notice (April 9, 2009); WCX *Ex Parte* Notice (May 20, 2009); WCX *Ex Parte* Notice (November 13, 2009) [41 pages]; WCX *Ex Parte* Notice (November 13, 2009) [38 pages]; WCX Letter (January 11, 2011); WCX Confidential submission (January 11, 2011).

Finally, after WCX escalated its attempts to obtain a resolution beginning in January, 2011, the Bureau released its Order dismissing the Petition without prejudice. The Order finds that the "network improvement plan" is defective because it is expressly based on WCX recovering support based on WCX's own costs. Order ¶¶ 7-9. Those paragraphs state (notes omitted, emphasis added):

7. *Worldcall's Network Improvement Plan.* We conclude that Worldcall has failed to provide an acceptable network improvement plan, as required by section 54.202(a)(1)(ii) of our rules. As Worldcall admits, its network improvement plan is "inaccurate," "unattainable," and "not . . . sustainable," unless Worldcall would be eligible to be "reimbursed based on its own costs" without regard to the identical support rule. The identical support rule, set forth in section 54.307 of the Commission's rules, currently provides that competitive ETCs are eligible to receive the same amount of support, per line served, as the incumbent provider in the same area. Worldcall asserts, however, that the identical support rule would not apply to any support it receives as a competitive ETC because Worldcall would seek high-cost support based on its own costs. Specifically, Worldcall claims that the Commission, in the *Interim Cap Order*, "abandon[ed] the Identical Support Rule for those carriers that choose to conduct their own cost studies," and Worldcall intends to avail itself of this purported exception to the rule.

8. Worldcall's assumption—that the identical support rule would not apply to a company that submits its own cost study—is incorrect. The *Interim Cap*

⁶ Worldcall Interconnect, Inc. Reply Comments (Jan. 21, 2009).

Order provides that a competitive carrier providing its own cost data “will not be subject to the interim cap” that the order imposed. The *Interim Cap Order* does not, however, state that a carrier submitting its own costs would be eligible to receive support without regard to the existing identical support rule, nor does the order specify an alternative methodology for calculating support. While the Commission noted in the *Interim Cap Order* that it was considering eliminating the identical support rule, it has not, to date, adopted any such rule change. We also note that Worldcall’s proposed interpretation of the *Interim Cap Order* is in tension with the purpose of the order—limiting growth in high-cost support.

9. Accordingly, we reject Worldcall’s network improvement plan because it explicitly depends on Worldcall’s incorrect assumption that the identical support rule would not apply to any support it could receive as an ETC. Without an acceptable network improvement plan, Worldcall’s petition fails to satisfy section 54.202(a)(1)(ii) of the Commission’s rules. We therefore dismiss without prejudice Worldcall’s ETC petition for failure to comply with the Commission’s requirements for ETC designation.

D. The Bureau Interpretation Misconstrues the “Identical Support Rule,” is Inconsistent With the *CETC Interim Cap Order* and Belies the Commission’s Defense Before the D.C. Circuit.

According to the Bureau, the Commission’s holding in ¶ 37 of the “*CETC Interim Cap Order*” that “a competitive ETC will not be subject to the interim cap to the extent that it files cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent LEC” *did not* mean that a CETC could “file cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent LEC.” Two and ½ years after the Petition the Bureau now, and for the first time, reads the *CETC Interim Cap Order* “exception” to mean that a CETC can submit “own cost” studies as a means to bring payments *back up* to the amount the CETC would have received under “Identical Support” without any cap. In other words, the Bureau construes the “Identical Support Rule” to be mandatory: CETCs must always accept support based on the incumbent’s costs, and can never do what only an incumbent can do: that is, come in to the Commission, prove up its own costs and receive support based on its “own costs.” This reading is flatly inconsistent with *CETC Interim Cap*

Order ¶ 31 explanation that a CETC may “file cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent LEC.”

The Bureau has misconstrued the “Identical Support Rule” and the *CETC Cap Order*. The Bureau’s construction makes the “exemption” empty and meaningless, and worse it locks in place all of the well-known deficiencies of the “Identical Support Rule.” It is also inconsistent with the arguments the Commission made to the D.C. Circuit on appeal, *See*, FCC Response Brief on Appeal, *Rural Cellular Association v. FCC*, D.C. Circuit Court of Appeals, No. 08-1284 and 08-1285, pp. 37, 59-60, 62-64 (March 25, 2009).⁷ The Bureau believes the Commission never intended to ever allow any exemption and the whole thing was merely a ploy. The D.C. Circuit, however, *believed* what the Commission said, and affirmed in part based on actual availability of the “exemption.”⁸ WCX – like the D.C. Circuit – took the Commission at its word

⁷

... Nonetheless, to protect against any possibility that the interim cap might deny competitive ETCs sufficient support, the Commission provided that a competitive ETC “will not be subject to the interim cap to the extent that it files cost data” with the Commission “demonstrating that its costs meet the support threshold in the same manner as the [ILEC].” *Id.* ¶ 1.

The Commission reasonably interpreted section 254(b)(5) of the Act to require sufficient, but not excessive, universal service support. Regardless, Petitioners failed to demonstrate that their high-cost support would actually be insufficient under the interim cap. The Commission found no record evidence for such a claim. Moreover, if a competitive ETC believes its high-cost support is insufficient, the *Order* offers competitive ETCs an exception - a competitive ETC will not be subject to the interim cap if it files cost data demonstrating that its costs meet the support threshold in the same manner as the ILEC.

....

The availability of this exception, which neither Petitioners nor their amicus even mention, also undercuts their allegation that the interim cap will prevent newly designated competitive ETCs from receiving high-cost support in states that received no competitive ETC high-cost support prior to March 2008. Br. 49. A competitive ETC will be eligible for support in these states if it makes the cost showing required by the *Order*.

(Emphasis added), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-289602A1.pdf.

⁸ *Rural Cellular Association v. FCC*, 588 F.3d 1095, 1101, 1104, 1105 (D.C. Cir., 2009)(emphasis added):

Numerous commenters expressed support for the rule, and the Commission properly took those views into account when it decided to impose the interim cap. Other commenters opposed the cap or recommended changes to its operation. The Commission likewise took those views into account, responding throughout the *Order* to specific critiques of the cap. *See, e.g., Order* PP 11-

when it said CETCs could submit their own costs and recover based on their own costs. The Bureau's Order must be reversed. The Bureau's Order – if it is not corrected on review – will put the Commission's imprimatur on what is turning out to be a broken promise and make it evident the Commission never intended to allow any “own cost” exceptions.

24. Indeed, the Commission even added an exception to the rule based on the comments. *See, e.g.*, Comments of The Iowa Telecomm. Ass'n on Pub. Notice of May 1, 2007 at 4 (May 31, 2007) (suggesting the Commission base support on CETCs' own costs).

...

Furthermore, the Commission created an exception to the cap. To the extent a CETC believes its capped support is insufficient, the *Order* permits the CETC to obtain an exemption upon “fil[ing] cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent LEC.” *Order* P 31. There is no reason to believe--and petitioners have offered no data proving--that support under the cap will be insufficient. Thus, the limits imposed by the interim cap seem unlikely to deprive any CETCs' customers of service, while they are almost sure to reduce the CETCs' profits. Conveniently, both petitioners and their amicus fail to mention the exemption provision even a single time in their briefing. However, at oral argument, counsel for petitioners, when pressed on the significance of the exception, characterized it as merely a “side door” that effectively achieves nothing since there is no “accounting mechanism” in place for wireless carriers to calculate their costs. Although we need not consider this belated complaint, we think it not unreasonable for the Commission to ask that providers be prepared to calculate their own costs.

... to the extent a CETC believes it should be entitled to greater per-line high-cost support than the amount disbursed under the cap, the Order permits the CETC to obtain an exception upon “fil[ing] cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent LEC.” *Order* P 31. If a CETC is not able to make this showing, the argument that reducing its support below that of the ILEC violates the principle of competitive neutrality has little force.

The Identical Support “rule” was never mandatory; CETCs always retained the right to recover support based on their own costs. ILECs receive high-cost support in various ways. Some receive support based on their own costs. Some are required to use “forward looking” cost studies that do not reflect actual investment and expense. The large incumbents like AT&T and Verizon do not recover explicit support from federal USF; instead they rely on continued implicit support flowing from “above cost” prices for service in urban and lower cost areas, and from other “high margin” services like access charges. These profits are then implicitly used to support “below cost” services in their rural areas and high-cost areas.

The Commission decided in 1997 that the “least burdensome way to administer” portability and support to competitive carriers would be to let CETCs choose to recover the same per-line support as the ILEC, regardless of the competitive ETC’s own cost of providing service. The Commission reasoned that it could lawfully use the ILEC’s cost rather than “requiring” or “compelling” CETCs to submit cost studies. *Universal Service First Report and Order* ¶ 313.⁹ ETCs are therefore not *required* to document their own costs to receive high-cost support; instead, they may opt to receive support for each of their lines based on the same per-line support the ILEC receives in the relevant service area. *Id.*; 47 C.F.R. § 54.307(a)(1). The “identical

⁹ 313. We conclude that determining a rural ILEC’s per-line support by dividing the ILECs’ universal service support payment by the number of loops served by that ILEC to calculate universal service support for all eligible telecommunications carriers serving customers within that rural ILEC’s study area will be the least burdensome way to administer the support mechanisms and will provide the competing carrier with an incentive to operate efficiently. Besides using a forward-looking or embedded costs system, the alternative for calculating support levels for competing eligible telecommunications carriers consists of requiring the CLECs to submit cost studies. Compelling a CLEC to use a forward-looking economic cost methodology without requiring the ILEC’s support to be calculated in the same manner, however, could place either the ILEC or the CLEC at a competitive disadvantage. We thus disagree with commenters that assert that providing support to eligible CLECs based on the incumbents’ embedded costs would violate Section 254(e).

Report and Order, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157, 12 FCC Rcd 8776 (rel. May 1997) (“*USF Order*”)(emphasis added).

support rule” cannot be read to mandate identical support since the Commission has repeatedly said that CETCs have the present option to receive support based on their own costs. Each time, the Commission identified its significant concerns with “Identical Support” because of the perverse incentives it creates. Page 52 of the Commission’s Brief to the D.C. Circuit succinctly summarized the problems with “Identical Support” as part of its justification for the cap, but *also* used the same concerns to highlight why the “own cost” exception exists and how it operates:

The Commission, in fact, found that “it is not clear that identical support has . . . resulted in competitive neutrality.” *Id.* ¶ 22. Identical support also “fails to create efficient investment incentives for competitive ETCs” and “contraven[es] the Act’s universal service goal of improving the access to telecommunications services in rural, insular and high-cost areas.” *Id.* (citing 47 U.S.C. § 254(b)(3). “Because a competitive ETC’s per-line support is based solely on the per-line support received by the [ILEC], rather than its own network investment in an area,” the competitive ETC has an “incentive to expand the number of subscribers . . . located in the lower-cost parts of high-cost areas” instead of expanding the geographic scope of its network, particularly into areas with the lowest population densities (and correspondingly, the highest costs). *Id.*

“Identical support” is “identical” only with regard to explicit payments directly from the federal USF. ILECs still receive *implicit* subsidies from other rates (such as access charges) and explicit subsidies from federal and non-federal programs, including state USF systems. Competitive carriers usually do not have the same kind of service or revenue mix that would allow them to rely on implicit subsidies and increasingly are frozen out of other federal and non-federal programs as well. For example, wireless carriers generally do not receive “access” revenues since they cannot file tariffs.¹⁰ Some competitive carriers do not serve urban areas and instead focus almost entirely on high-cost or rural areas – as WCX would here. They therefore cannot enjoy support through implicit subsidies like AT&T and Verizon. Mandating identical

¹⁰ See Declaratory Ruling, *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, 17 FCC Rcd 13192 (2002) (*Sprint/AT&T Declaratory Ruling*), petitions for review dismissed, *AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003).

support under the current approach would violate the “competitive neutrality” principle enunciated in the *Universal Service First Report and Order*.

Section 54.307 speaks only to “identical support” but the Commission has repeatedly held that CETCs have the option to submit their own costs *and recover support based on their own costs*. The rule cannot be read to **require** identical support. *See Order, High Cost Universal Service Report*, 23 FCC Rcd. 8834, 8848-8849, ¶ 21 (2008) (“*CETC Interim Cap Order*”); MO&O, *In the Matter of Applications of AT&T, Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations*, 22 FCC Rcd. 20295, 20330 (2007) (“*Dobson Order*”); MO&O, *Applications of ALLTEL Corporation, Transferor, and Atlantis Holdings LLC, Transferee For Consent to Transfer Control of Licenses, Leases and Authorizations*, WT Docket No. 07-185, 22 FCC Rcd 19517, 19521, ¶¶ 9-11 (2007) (“*ALLTEL Order*”).

The AT&T/Dobson and Alltel decisions in particular make no sense if § 51.307 is read to prohibit anything other than identical support for CETCs. The discussion in those orders simply cannot be squared with the notion that Identical Support is mandatory and the “own cost” exercise is merely for the purpose of receiving “uncapped” Identical Support.

The *Alltel Order* clearly expresses the intent that the “own cost” exception means the CETC recovers support based on its own costs – not under Identical Support. The wording cannot be read to contemplate that the “cost study” is used merely to bring support back to pre-cap levels, all while still under “Identical Support” measurements. *See* ¶¶ 9-11 state (notes 40-43 omitted, 44 quoted below; emphasis added):

9. Although the Commission has not yet adopted the Joint Board’s recommendation, this transaction implicates the Joint Board’s recommendation.

ALLTEL is currently the largest beneficiary of competitive ETC funding and accounts for approximately 29 percent of all high cost fund payments to ETCs. n40 Given ALLTEL's significant role in the expansion of the high cost fund through ALLTEL's receipt of competitive ETC funding, which forms the basis of the Joint Board's concern, we find that it is in the public interest to immediately address ALLTEL's continued receipt of competitive ETC funding in the context of this transaction. Specifically, as recommended by the Joint Board, we impose an interim cap on high-cost, competitive ETC support provided to ALLTEL as a condition of this transaction, which will apply until fundamental comprehensive reforms are adopted to address issues related to the distribution of support and to ensure that the universal service fund will be sustainable for future years. As a result of this condition, ALLTEL will be capped at the level of support that it received as a competitive ETC for 2007, measured as of the end of June 2007 on an annualized basis.

10. We also find that it is in the public interest to adopt a limited exception from the application of the interim cap condition to ALLTEL. Specifically, ALLTEL will not be subject to the interim cap condition to the extent ALLTEL (1) files cost data showing its own per-line costs of providing service in a supported service area *upon which its high cost universal service support would be based*, and (2) demonstrates that its network is in compliance with section 20.18(h) of the Commission's rules specifying E911 location accuracy as measured at a geographical level defined by the coverage area of each Public Safety Answering Point (PSAP).

11. Because a competitive ETC's per-line support is currently based solely on the per-line support received by the incumbent LEC, rather than its own network investments in an area, the competitive ETC has little incentive to invest in, or expand, its own facilities in areas with low population densities, which is inconsistent with the Act's universal service goal. *However, to the extent ALLTEL files its own per-line costs, it would have an incentive to invest in areas with low population densities, which would serve our universal service goals.* Accordingly, we find that the public interest would be served by allowing ALLTEL to receive high cost support in excess of annualized, June 2007 levels to the extent such support is based on ALLTEL's actual costs, and to the extent ALLTEL also meets our E911 standards as described below. ALLTEL must file its cost data with the Commission or the relevant state commission - whichever approves, or subsequently approves, its ETC designation - on an annual basis and line-count data on a quarterly basis. ALLTEL may update its cost data on a quarterly basis, as do rural incumbents today. Only if the cost data is approved by the relevant state commission or the Commission may ALLTEL then file the cost data submission with the Universal Service Administrative Company (USAC); ALLTEL's high cost universal service support would then be determined by USAC by applying the same benchmarks that are applied to an incumbent LEC's costs to determine its support. n44

n44 For example, in the case of a competitive ETC providing service in a non-rural study area, a cost per line would be developed, which would be compared to the benchmark threshold for support calculated by the High-Cost Proxy Model. For competitive ETCs providing service to rural study areas, a cost per line would be developed for each competitive ETC for each incumbent study area that it serves. Support could be determined by comparing the competitive ETC's cost per loop incurred to provide the supported services to the national average cost per loop developed by the National Exchange Carriers Association (NECA) pursuant to section 36.613 of the Commission's rules, as adjusted to accommodate the cap on incumbent high-cost loop support.

The Commission was clearly describing a method for CETCs to submit their *own costs* and recover support calculated on *the CETC's own costs* and not by reference to the per-line amount recovered by the incumbent for the same area. The entire discussion in note 44 makes this absolutely obvious. The references to “support being based on Alltel's costs” and “on its own network investment” in ¶ 11 could not be plainer.

The *Dobson Order* states in ¶ 72 (notes omitted):

72. We condition this proposed transaction on this voluntary commitment to an interim cap on high-cost, competitive ETC support. However, as we stated in the ALLTEL-Atlantis Order, we find that it is in the public interest to adopt a limited exception from the application of the interim cap condition to AT&T and Dobson. Specifically, AT&T and Dobson will not be subject to the interim cap condition to the extent AT&T and Dobson (1) file cost data showing their own per-line costs of providing service in a supported service area upon which their high cost universal service support would be based, and (2) demonstrate that their networks are in compliance with section 20.18(h) of the Commission's rules specifying E911 location accuracy as measured at a geographical level defined by the coverage area of each Public Safety Answering Point (PSAP).

Paragraph 72 clearly uses the same concept: AT&T/Dobson could “file cost data showing their own per-line costs of providing service in a supported service area upon which their high cost universal service support would be based.” This option was expressly drawn from the same exception approved in the prior Alltel merger approval, which as noted above obviously

contemplates that when the “exception” applies, the CETC will receive support based on its “own costs” rather than being constrained by *either* the “cap” or the “Identical Support Rule.”

The identical support rule was never mandatory. A CETC could at any time reject “identical support” and proceed under “own cost” before the “*CETC Interim Cap Order*” and afterwards. When the Commission adopted the “Interim Cap” and created the “exemption from the cap” it cited directly to *Alltel* and *AT&T/Dobson* as previous examples of how the “exception” would work. The Bureau’s interpretation is inconsistent with prior Commission decisions construing the “Identical Support Rule,” the intent and words used in the *CETC Interim Cap Order* and the Commission’s defense of the Interim Cap before the D.C. Circuit.

WCX is doing exactly what the Commission has repeatedly said it wants. WCX wants to file its own per-line costs and recover support based on WCX’s own costs in the service area, which would allow WCX to invest in a high-cost, low population density area that is unserved and underserved. WCX will provide currently supported services and bring broadband to areas where there is none. This absolutely and fully serves the Commission’s universal service goals. The Bureau result violates the statutory requirement of adequacy and sufficiency, perpetuates and locks in Identical Support by eliminating the “exception” that saved the *CETC Cap Order* on review by the D.C. Circuit. The Order is legally erroneous and simply wrong on policy.

E. Failure to Reverse Will Result in OMB Refusal to Approve Further USF Information Collection Forms.

On May 3, 2009 – largely at the urging of WCX – the Office of Management and Budget informed the FCC it:

should, as soon as reasonably possible, address outstanding issues related to the limited exception from application of the interim cap to a competitive eligible telecommunications carrier that files its own cost data. Unless there are statutory

or legal reasons which prevent this from occurring, OMB will not approve any future revisions or extensions for the full 3-year period until this has been addressed.¹¹

In other words, the Commission cannot change any USF-related information collection forms, or promulgate any new forms, until it *implements the “own costs” exception*. WCX respectfully requests that the Commission honor its promises and overrule the Bureau. Should this not occur, WCX will have no choice but to bring this situation to OMB’s attention – along with the D.C. Circuit.

There is another reason for rejecting the Bureau’s result. WCX’s application was filed in October, 2008 – more than two years ago. If there was a defect, the Bureau should have long ago advised WCX so it could be cured. Waiting more than two years and then suddenly dismissing based on a perceived defect concerning a major assumption and basis of the Petition known to all and advertised in the Petition and all other filings, is simply arbitrary and capricious. More important, the *CETC Interim Cap Order* is also now quite long in the tooth – over three years old. The D.C. Circuit’s opinion affirming emphasized (588 F.3d at 1106) that it was granting considerable deference largely because the cap was to be of relatively short duration:

The Commission stated specifically that “[t]he interim cap will remain in place only until the Commission adopts comprehensive, high-cost universal service reform,” on which it promised to move forward “in an expeditious manner.” *Order* PP 23, 37. We trust the Commission’s assurances today. However, should the Commission fail to fulfill its obligations, additional and more searching judicial review may be appropriate. *Compare CompTel 2002*, 309 F.3d at 14-16 (upholding interim FCC rules adopted to avoid disruption pending broader reform to make access charges truly cost-based and eliminate implicit subsidies), *with Competitive Telecomms. Ass’n v. FCC*, 87 F.3d 522, 530, 531-32, 318 U.S. App. D.C. 288 (D.C. Cir. 1996) (refusing to uphold an “interim” rule that perpetuated non-cost-based access charges and had been in place for thirteen

¹¹ Notice of Office of Management and Budget Action, ICR Ref. No.: 200901-3060-012; OMB Control No.: 3060-0986 (May 3, 2009).

years without any “discernable progress” by the FCC to “transition” to a fully cost-based system).

The FCC has already broken the promise that the cap would be “interim” and quickly replaced soon as part of “expeditious” “comprehensive reform.” WCX respectfully requests that the Commission not also break the “exemption” promise, which has only become more important given that “interim” is now effectively “permanent.”

F. Conclusion.

WCX is attempting to do exactly what the Commission said it wanted carriers to do – invest in new technology to provide broadband and supported services to high-cost rural areas that presently lack adequate coverage and no broadband. Unless the Commission acts, Warren and Washington counties will continue to suffer from long-standing neglect by the incumbents and they will remain unserved and underserved.

The Bureau’s Order dismissing the Petition based on WCX’s declared intent to use the “exemption from the cap” and draw support based on WCX’s own cost was legal error, and denies support to an area that largely lacks broadband and adequate basic service. The Bureau decision is premised on a legal error and represents bad policy. The Commission must reverse and instruct the Bureau to expeditiously complete its review.

WCX respectfully requests such other and further relief to which it has shown itself entitled.

Respectfully Submitted,
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